VENKATESWARA SDN BHD

v.

DATUK BANDAR KUALA LUMPUR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA TAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-117-2000]
20 MARCH 2001

ADMINISTRATIVE LAW: *Exercise of administrative powers - Declaratory order - Development of land in Federal Territory, Kuala Lumpur - Zoning charges - Zoning premiums imposed by Commissioner of Lands and Mines paid for - Levying of zoning charges a second time by Datuk Bandar - Whether in breach of rules of natural justice - Whether ultra vires - Federal Territory (Planning) Act 1982, s. 40(1) - Federal Capital Act 1960, ss. 4, 12 - Rules of High Court 1980, O. 55 r. 13*

In 1967 the applicant had acquired a piece of 'agricultural' land in the Mukim of Kuala Lumpur, Selangor ('the land'). In 1969 the applicant successfully applied to the Commissioner of Lands and Mines, Kuala Lumpur for the conversion of the land use category of the land from 'agriculture' to 'building', and an endorsement was accordingly made on the land's title subjecting its use to "erection of a hospital and buildings appurtenants thereto". It was not in dispute that a zoning fee of RM1 million had been levied on and paid by the applicant in respect of the conversion. In 1994, the applicant applied to the respondent for planning permission to build the said private hospital on the land. The respondent knew about the endorsement on the land and the payment of RM1 million fee, but that notwithstanding, went on to impose further zoning charges of RM2,133,000 on the land. It was the respondent's stand that the proposed development had involved a change in the category of "land use zoning" from "residential" to "commercial", and as such, zoning charges ought to be levied pursuant to s. 40(1) Federal Territory (Planning) Act 1982 ('the Act'). Dissatisfied, the applicant applied by way of originating motion for a declaratory order that the decision of the respondent was bad in law. In retort, the respondent raised a preliminary objection as to the propriety of the applicant proceeding under O. 55 Rules of the High Court 1980 ('RHC'), arguing that the applicant, properly, should have appealed against the decision under s. 42(1) of the Act.

Held:

[1] The respondent's procedural objection is misplaced as the instant case is not a question of development charges per se but the propriety of levying development or zoning charges a second time. Under s. 40(1) of the Act, a development charge shall be levied where there is "a change of use in respect of any land so as to enhance the value of the land". There is no change of use in the instant case so as to enhance the value of the land. (p 1002 g-h & 1003 a-b)

[2] The respondent's contention that the applicant should have appealed under s. 42(1) of the Act is wrong as s. 42 deals with assessment of development charge whereas the applicant's contention is not dealing with development charges but with zoning, which zoning was carried out by the Commissioner of Lands and Mines and the Executive Council of the Selangor State with the Menteri Besar as chairman. The zoning and conversion that took place in 1969 was within the jurisdiction of the Commissioner of Lands and Mines. Clearly, the respondent was estopped from denying the status of the land in 1969. (pp 1003 d-e & 1004 a-b)

[3] It was evident that the applicant was paying RM70,797 annually as quit rent for a commercial land zoned for a hospital. Therefore, to now demand a sum of RM2,133,000 is grossly unreasonable. The respondent had exceeded his powers and breached the rules of natural justice and therefore his act was *ultra vires* the Constitution and the governing statutes. The respondent was also acting *ultra vires*, knowing fully well that the said premiums and charges amounting to RM1 million had already been paid. To request for further sum of RM2,133,000 would amount to duplicity of charges. (pp 1004 g-h & 1005 b-c)

[Declaration granted; respondent's decision set aside.]

Case(s) referred to:

Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin [1997] 2 CLJ 248 CA ***(refd)***

Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 ***(refd)***

Scott & English (M) Sdn Bhd v. Leikie Refrigeration & Stainless Steel Industries Sdn Bhd & Ors [1994] 3 CLJ 114 HC ***(refd)***

Shell Co of the Federation of Malaya Ltd v. Chairman, Municipal Council [1961] 2 MLJ 141 ***(refd)***

Legislation referred to:
Federal Capital Act 1960, ss. 4, 12
Federal Territory (Planning) Act 1982, ss. 40(1), 42(1)
Rules of the High Court 1980, O. 55

For the applicant - N Mahadevi; M/s Mahadevi Nadchatiram & Partners
For the respondent - S Nanthabalan (YN Tan); M/s Shook Lin & Bok

Reported by WA Sharif

JUDGMENT

Faiza Tamby Chik J:
Venkateswara Sdn. Bhd. is the applicant before this court in encl. 2 and having subsequently amended that application by encl. 7, now seeks to obtain the following orders:

(a) The applicant be granted leave and extension of time to file this notice of originating motion pursuant to O. 55 r. 13 Rules of the High Court 1980 to appeal against the decision of the Datuk Bandar Kuala Lumpur dated 28 August 2000 and which letter was received by the applicant on 11 September 2000;

(b) A declaration that the Order made by the Datuk Bandar Kuala Lumpur at his meeting on 1 June 2000 be declared null and void;

(c) An order that the land held under Grant 5478 Lot 1627 Mukim Kuala Lumpur be zoned for erection of a hospital and buildings appurtenant thereto including staff quarters as from 11 March 1969;

(d) A further Order that no zoning charges should be levied for the conversion from "residential" to a "commercial (private hospital)" since the said land held under Grant No. 5478 Lot 1627 Mukim Kuala Lumpur had already been converted on 11 March 1969 and conversion fees have already been paid;

(e) For an Order that the Development Order for the hospital and buildings plans be forwarded forthwith to the applicant;

(f) cost;

(g) Further and other relief as this Honourable Court deems fit.

The applicant is out of time by less than three months to file this application because the applicant had sent letters to the Ministry of Housing and Local Government and the land office. The replies from the relevant authorities *vide* letters dated 30 October 2000 from the Ministry of Housing and Local Government and from the land office dated 2 September 2000 are in exh. "K5" and "K6". In *Scott & English (M) Sdn. Bhd. v. Leikie Refrigeration & Stainless Steel Industries Sdn. Bhd. & 2 Ors.* [1994] 3 CLJ 114 Chong Siew Fai J (as he then was) held that:

(1) The grant of extension of time to appeal is a matter of discretion for the court and the court in the exercise of its discretion would normally consider the length of the delay, the reasons for the delay, the chances of the appeal succeeding if time for appealing is extended and the degree of prejudice to the potential respondent if the application is granted. The solicitor's mistake, it's nature and the circumstances under which it was made are also factors to be considered by the court.

(2) However, these factors are merely a framework or guide for the purpose of exercising the discretion and are not intended to be rigid mandatory requirements. It is not necessary that all the factors must be in favour of an applicant in order that the discretion may be exercised for the applicant's benefit.

(3) On the facts and circumstances of the case, the delay, though of some considerable time, has been reasonably explained and has been shown to be connected to steps taken in relation to the order of 25 January 1992 now intended to be appealed against.

(4) In looking at the element of chances of success of the appeal, there appears to be some merits in that the amount entered for the judgment appears so far exceed the mount of the counterclaim, which in any event is only made by the first defendant. In addition there would be no prejudice to the defendants should extension of time be granted to the plaintiff.

(5) Having considered the facts and circumstances of the case relating to the application for extension of time and testing them against the factors to be taken into account, the discretion of the court ought to be exercised in favour of granting the relief sought.

Therefore in the instant case there has been no inordinate delay by the applicant in filing this application. Accordingly, I exercise my discretion in favour of the applicant and extend time as it does not prejudice the respondent.

On 30 March 1967, the applicant purchased land held under Geran No. 5478 No. Lot 1627 Mukim Kuala Lumpur (hereinafter referred to as "the subject property") (see exh. K1 encl. 1). The subject property was then categorised under "agricultural" use. The applicant thereafter applied to the Commissioner of Lands and Mines, Kuala Lumpur to convert the land use category for the subject property from "agricultural" to "building" with an express condition attached to the land. On 11 February 1969, the category of land was converted and the title was accordingly endorsed. After conversion, the category of land use with effect from 11 March 1969, according to the title was as follows:

> The land herein described shall be used for erection of a hospital and buildings appurtenant thereto including staff quarters. (See Exhibit K-1 Enclosure 1).

In 1994, the applicant forwarded an application to the respondent, Datuk Bandar Kuala Lumpur for planning permission to build two private hospital blocks having three and nine floors and one mortuary (1 floor) on the subject property. The respondent processed that application, under the relevant planning legislation, that is, the Federal Territory (Planning) Act 1982 (the Act) and duly levied a development charge of RM2,133,000 (see exh. K2 in encl. 1) on the grounds that the proposed development involved a change in the category of "land use zoning". By letters dated 25 June 1999 and 10 August 1999 the applicant wrote to the respondent and sought an exemption for payment of development charge (see exh. K3 encl. 1). The respondent considered the applicant's request at a meeting held on 1 June 2000 and notified the applicant, *vide* letter dated 28 August 2000 that the applicant's request for exemption from payment of development charges was rejected and that the applicant was required to pay development charges of RM2,133,000 if it desires to develop the subject property and construct the proposed hospital (see exh. K4 of encl. 1). The basis of the respondent's stand on the matter was that the proposed development involved a change in the category of land use zoning from "residential" to "commercial (private hospital)" which necessitated the imposition of a development charge. The applicant maintains in this application that when they purchased the subject property and thereafter applied to the Commissioner of Lands and Mines, Kuala Lumpur it was for both conversion of the category of land use and for zoning and further that the premium was paid for that purpose. The applicant now seeks to set aside the decision of the Datuk Bandar Kuala Lumpur Lumpur, made on 1 June 2000, rejecting the applicant's request for exemption of development charge.

The following affidavits were filed in support of the application:

(a) The affidavit of N. Kamala Devi affirmed on 12 December 2000 (encl. 1);

(b) The affidavit of N. Kamala Devi affirmed on 14 February 2001 (encl. 9);

(c) The affidavit of N. Kamala Devi affirmed on 5 March 2001 (encl. 10);

(d) The affidavit of N. Kamala Devi affirmed on 5 March 2001 (encl. 10A);

(e) The affidavit of N Kamala Devi affirmed on 13 March 2001 (encl. ...).

The respondent filed the following affidavits in opposing the application:

(a) Affidavit of Tan Sri Dato' Kamaruzzaman bin Shariff affirmed on 7 February 2001 (encl. 5);

(b) Affidavit of Tan Sri Dato' Kamaruzzaman bin Shariff affirmed on 2 March 2001 (encl. 11);

(c) Affidavit of Tan Sri Dato' Kamaruzzaman bin Shariff affirmed on 9 March 2001 (encl. 12).

The first procedural objection is as regards the commencement of this application under O. 55 of the Rules of the High Court (RHC). The first paragraph of the intitule of the originating motion says:

> Dalam perkara Kaedah-Kaedah Mahkamah Tinggi 1980 dan Aturan 55 Kaedah-Kaedah Mahkamah Tinggi 1980.

The objection in this regard is that O. 55 of the RHC does not apply to the subject matter of the application. The subject matter of the application is the imposition of a development charge under s. 40(1) of the Act. It is contended firstly that nowhere in the Act is it stated that a person who is aggrieved with the decision of the Datuk Bandar Kuala Lumpur may appeal to the High Court against any decision pertaining to the imposition of a development charge. Secondly, it is important to note that O. 55 pertains to "Appeals from Subordinate Courts and Statutory Bodies". In the present case, the respondent is neither a Subordinate Court nor a Statutory Body. I am of the opinion that the contention by the respondent is misplaced because in the instant case it is not a question of development charges *per se* but the propriety of levying development or zoning charges a second time. Under the Act development means "the carrying out of any building, engineering, mining, industrial, or other similar operation in, on, over, or under land, and includes any change in the use of any land or building or any part thereof, or the subdivision or amalgamation of lands" and in respect of development charge and liability thereto s. 40(1) of the Act states, "Where a local plan or an alteration of a

local plan effects a change of use, density, plot ratio or floor area in respect of any land so as to enhance the value of the land, a development charge at the prescribed rates shall be levied in respect of any development of the land commenced, undertaken, or carried out in accordance with the change". It is clear in the instant case the Fresh Express Condition clearly states, "The land herein described shall be used for erection of a hospital and buildings appurtenant thereto including staff quarters". There is no change of use in the instant case so as to enhance the value of the land.

Therefore the objection raised by the respondent is without merit because O. 55 of the RHC does not apply to the subject matter of the instant application.

There is another reason why the said objection is without merit. The respondent's appointment is determined by s. 4 of the Federal Capital Act 1960. Therefore, his appointment was conferred by statute by virtue of an Act of Parliament. By s. 12 of the Federal Capital Act 1960 it determines the powers and duties of the commission. There is no mention of zoning the said property as his powers and duties. The formation of the Federal Territory of Kuala Lumpur was in 1974. The respondent's contention that the applicant should appeal under s. 42(1) of the Federal Territory Planning Act 1982 is wrong because s. 42 deals with assessment of development charge whereas the applicant's contention is not dealing with development charges but with zoning and which zoning was carried out by the Commissioner of Lands and Mines, the Executive Council of the Selangor State Council with the Menteri Besar as chairman. In 1969, the said land was zoned for erection of a hospital and building appurtenant thereto including staff quarters and zoning charges of RM1 million had been paid. I am of the view that the respondent if he had objected to this procedure, then should have filed a conditional appearance and applied to strike out the originating motion; since he had failed to do and by filing affidavits have acquiesced and given jurisdiction to this court to hear this motion. Therefore, the respondent's preliminary objection to procedure is bad in law since the subject of the dispute was in 1969 and the Commission of Land & Mines *vide* exh. B had referred the case to the Deputy Registrar of Planning and Building Control Development who in turn referred to the Commissioner of Lands and Mines. On 31 January 2001, the Commissioner of Lands and Mines replied that "at this point of time the file record in respect of the granting and use of new express condition in respect of the land cannot be traced by this department." This is possibly because the granting and use of the new express conditions were made before the Federal Territory Kuala Lumpur was formed on 1 February 1974. Based on the connotation stated on the title deed of this land, the said land is still subject to the express condition

which is still in force, that is "the land herein described be used for the erection of a hospital and buildings appurtenant thereto including staff quarters". The respondent's own exh. "B" confirmed that the conversion of the express condition is within their jurisdiction under the National Land Code 1965 rules and therefore the zoning and conversion took place in 1969 was within the Commissioner for Lands and Mines upon inquiry of exh. A that the land was zoned in 1969. Therefore, the respondent is estopped from denying the status of the land in 1969.

In para. 5(iv) of the respondent's affidavit, the respondent admits that the applicant's land did not fall within the jurisdiction of the respondent, therefore at that point of time, the National Land Code 1965 applied and continued to apply. Upon formation of the Federal Territory of Kuala Lumpur in 1974, the land and the relevant approvals continued to apply as it is since 11 March 1969 and the Federal Territory Planning Act 1982 did not change the status of the land as a private hospital. The applicant's exh. "K6" letter dated 2 September 2000 from the Department of Lands and Mines confirms that quit rent paid by the applicant is for land zoned for hospital and an endorsement is printed out boldly showing:

> The land herein described shall be used for erection of a hospital and buildings appurtenant thereto including staff quarters.

It is observed that even when inquiry was made by the applicant *vide* letter dated 30 October 2000, exh. "K5" to Kementerian Perumahan dan Kerajaan Tempatan, attaching a copy of the title deed they informed the applicant that the said land was commercial and meant for a hospital and therefore there was no need for any approvals from their department. Exhibit "K7" of the second affidavit, the letter from Dewan Bandaraya to the architects of the applicant when instructions were given to do changes on the building plan, no question of zoning was raised in 1980 as can be seen from exh. " K7". Exhibit "K8" shows that the applicant was paying RM70,797 annually which was quit rent for a commercial land zoned for a hospital. Therefore, now by demanding a sum of RM2,133,000 is grossly unreasonable and what the applicant is requesting for is a Declaratory Order that the finding of the respondent on 1 June 2000 was wrong and ought to be declared null and void. The respondent should have transferred this case to the Commissioner of Lands and Mines, having come to his decision only after referring to the Commissioner of Lands and Mines and the respondent had mistakenly failed to investigate properly why exorbitant quit rent of RM70,000 was paid when there was sufficient evidence to show that the land was zoned for a hospital. I come to the conclusion that the respondent had exceeded his powers and breached the rules of natural justice, and therefore his act was *ultra vires* the constitution and the governing

statutes. I think the respondent by not acting promptly since 1994 has caused loss and hardship to the applicant who has been paying high assessments for the first year amounting to RM79,463.33 and therefore annually approximately RM160,000 (see exh. "K2" of the applicant's third affidavit). It is also observed that there were several properties (shophouses) which were approved and no question of zoning was raised (see exh. "K3" of the applicant's third affidavit). The respondent has not raised any arguable case and has not given a proper explanation and has admitted that the National Land Code 1965 applied because of the formation of the Federal Territory. The respondent was acting *ultra vires* knowing fully well that the said premiums and charges amounting to RM1 million had already been paid. By trying to request a further sum of RM2,133,000 it becomes a duplicity of charges. Having referred the matter to the Commissioner of Lands and Mines and relying upon his reply and knowing well the file was missing and the Commissioner of Lands and Mines having confirmed the endorsement, I come to the conclusion that the court can exercise its inherent jurisdiction to grant a declaratory order to set aside the respondent's decision.

There are a number of cases which lend support to my conclusion. However, the following cases are relevant on the issues raised by the respondent. In *Pengarah Tanah dan Galian Wilayah Persekutuan v. Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135 at pp. 148-149, Raja Azlan Shah Ag CJ (Malaya) (as DYMM then was) said:

> In the first place it must be made clear that the existence of a statutory remedy is no bar to an action for a declaration. This case falls within the general principle that the jurisdiction of the High Court is not to be taken away without express words; and this applies to an action for a declaration: see *Pyx Granite (ante)*. Secondly, all that a declaration does is to declare the rights of the parties and the effect of making a declaration would be that it would give the Land Executive Committee an opportunity of having second thoughts at the problem. Lastly, it is not the province of the courts to review the decisions of government departments merely on merits. Government by judges would be regarded as an usurpation. That clear statement of principle has since been approved and applied by the appellate courts. In *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn. (ante),* Lord Greene MR in the course of a judgment since approved by the House of Lords in *Smith v. East Elloe Rural District Council,* and in *Fawcett Properties Ltd. v. Buckingham Country Council (ante),* in dealing with the power of the court to interfere with the decision of a local authority which has acted unreasonably, said (page 686):

> the power of the court to interfere in each case is not that of an appellate authority to override a decision of the local authority, but is that of a judicial authority which is concerned, and concerned only, to see whether the local authority has contravened the law by acting in excess of the powers which Parliament has confided in it.

That is the reason for such cases to be remitted to the relevant authority for a fresh consideration and conclusion according to law. In *Kingston-upon-Thames Royal London Borough Council v. Secretary of State for the Environment*, the case was sent back to the Secretary of State for reconsideration. In *R v. Hillingdon London Borough Council (ante)*, the Council was required to reconsider the application for planning permission and reach a conclusion on it according to law. In my opinion the appropriate order would be to remit the case to the land Executive Committee for reconsideration and reach a conclusion on it according to law.

In *Shell Co. of the Federation of Malaya Ltd. v. Chairman, Municipal Council* [1961] 2 MLJ 141:

> The appellants were dissatisfied with a decision of the Municipal Council as to the rateable value of their property. They appealed under section 44 of the Town Board Enactment, (Cap. 137) filing in the Registry at Kuala Lumpur a document headed "Notice of Motion" stating that the Court would be moved for an order that the decision of the respondent should be varied on certain specified grounds. The respondent gave notice that they would oppose the motion on the ground that it was not supported by an affidavit as required by O. 59 r. 13(1) and as such it should be struck out. Hashim J in the Court below upheld the respondent's contention, and on appeal,
>
> Held: (1) the appellants had satisfied the letter and spirit of the condition laid down in section 44 of the said Enactment by filing a notice setting out the grounds of appeal;
>
> (2) except in cases covered by rule 4 of O. 52, affidavits may be filed up to the time of making the motion. A lack of strict compliance with this rule may well be an irregularity capable of being cured under the provisions of O. 70 and is not necessarily fatal to the validity of the motion.
>
> (3) O. 59 r. 13(1) makes it clear that the grounds of appeal must be set out in the motion itself. The affidavit mentioned in this rule which in the discretion of the Court may be supplemented at this hearing by oral evidence is the evidence on which the Court is to be asked to consider the grounds of appeal which have been set out.

In *Datuk Bandar Kuala Lumpur v. Zain Azahari Zainal Abidin* [1997] 2 CLJ 248, the Court of Appeal held:

> (3) As a general rule, where an applicant files an affidavit alleging that a particular decision was not arrived at in accordance with law, it is incumbent upon the particular decision-maker to affirm and file an affidavit rebutting the allegation and setting out those matters which led him to make the impugned decision. Subject to cases where good reasons were shown for the affidavit's absence, and cases where such an affidavit is unnecessary, this general rule will apply in full force where such an affidavit is absent and no cogent reasons are proferred by way of admissible evidence to explain the absence.
>
> (3a) The affidavit, in order to amount to a satisfactory rebuttal, must be affirmed by the person who has personal knowledge of the facts in issue. An affidavit by a deponent who has no personal knowledge of the consideration upon which the decision was based is pure hearsay and is worthless as evidence.

In the premises, I grant order-in-terms of the applicant's application in encl. (2) as amended by encl. (7) with costs.